86-600

No. 86-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Petitioners,

-against-

LEE STERLING and THOMAS LA PIANA,

Respondents,

and

HOUSING COUNCIL OF NEW YORK, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 6, 1986

QUESTIONS PRESENTED

1. Whether the "nail and mail" provision for the service of sanitation summonses is constitutional as applied to absentee landlords of multiple dwellings who are required by law to employ a janitor on or near the premises and conspicuously to display at the multiple dwelling his name, address, including apartment number, and telephone number, when the service is accomplished by taping the summons in a conspicuous public area of the building and a copy of the summons is mailed within 30 days to the landlord or his agent at the address of the multiple dwelling?

2. Whether Wuchter v. Pizzutti, 276 US 13 (1928), was impermissibly extended by the Circuit Court when it refused to consider the extrastatutory procedure of second mailings to the actual address of the landlord in determining the constitutionality

of a statute as applied to a specific group where the statute is otherwise constitutional?

LIST OF PARTIES

The parties in the proceeding below were:

Plaintiffs (Respondents here)

Lee Sterling
Thomas LaPiana

Plaintiff-Intervenor (Respondent here)

Housing Council of New York, Inc.

Defendants (Petitioners here)

Environmental Control Board of the City of New York and the City of New York

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The petitioners, the Environmental Control Board of the City of New York and the City of New York, respectfully pray that a Writ of Certiorari issue to review the judgment and memorandum decision of the United States Court of Appeals for the Second Circuit entered in the above-entitled proceeding on June 5, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit denying the Petition for Rehearing is reprinted in the Appendix at page 1. The unanimous decision of the United States Court of Appeals for the Second Circuit which declared the petitioners' "nail and mail" statute unconstitutional is reprinted in the Appendix at page 4. The order and judgment of the United States District Court for the Eastern District of New York dated February 27, 1985, is reprinted in the Appendix at page 30. The opinion of the United States District Court for the Eastern District of New York, dated July 29, 1982, and incorporated into the order and judgment of February 27, 1985, is reprinted in the Appendix at page 48.

JURISDICTION

Respondents brought this action in the

United States District Court for the Eastern District of New York. On February 27, 1985, the District Court (Weinstein, C.J.), by order and judgment, "adher[ing] to, adopt[ing] in full, and incorporat[ing]" his decision and order of July 29, 1982, as well as Magistrate Caden's October 3, 1983, October 19, 1984, and November 1, 1984 Reports and Recommendations, entered judgment for petitioners and "closed" the case. On respondents' appeal, the United States Court of Appeals for the Second Circuit, by order issued June 5, 1986, unanimously reversed the judgment of the District Court and declared the "nail and mail" statute unconstitutional as applied to absentee landlords. On July 7, 1986, the United States Court of Appeals for the Second Circuit denied the Petition for Rehearing. The jurisdiction of this Court is invoked pursuant to the provision of 28

U.S.C. § 1254(1). This petition has been filed within the time allowed by law.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution, Amendment V:

> "No person shall be ... deprived of life, liberty, or property, without due process of law;..."

U.S. Constitution, Amendment XIV:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law;..."

The Administrative Code of the City of New York

> §1404(d)(2)
>
> The environmental control board shall not enter any final decision or order pursuant to the provisions of paragraph one of this subdivision unless the notice of violation shall have been served in the same manner as is prescribed for service of process by article three of the civil practice law and rules or article three of the business corporation law, except that service of a notice of violation of any provision of the charter or administrative code, the enforcement of which is the

responsibility of the commissioner of sanitation and over which the environmental control board has jurisdiction, may be made by affixing such notice in a conspicuous place to the premises, the occupancy of which caused such violation, provided that such notice may only be affixed where a reasonable attempt has been made to deliver such notice to a person in such premises upon whom service may be made as provided for by article three of the civil practice law and rules or article three of the business corporation law. When a copy of such notice has been affixed, pursuant to this paragraph, a copy shall be mailed to the person at the address of such premises; proof of such service shall be filed with the Environmental Control Board within twenty days; service shall be completed within ten days after such filing."

The Administrative Code of the City of New York

§D26-22.03

Obligations of owner.-a. The owner of a multiple dwelling shall provide adequate janitorial services.

b. In a multiple dwelling of nine or more dwelling units, the owner shall either:

(1) perform the janitorial services himself, if he is a resident owner; or

(2) provide a janitor; or

(3) provide for janitorial services to be performed on a 24-hour-a-day basis in a manner approved by the department.

c. The owner of a multiple dwelling or his managing agent in control shall post and maintain in such dwelling a legible sign, conspicuously displayed, containing the janitor's name, address (including apartment number) and telephone number. A new identification sign shall be posted and maintained within five days following a change of janitor.

§D26-22.05

Residence of person performing janitorial services; limitation on number of dwelling units served.-The person who performs janitorial services for a multiple dwelling of nine or more dwelling units (other than where janitorial services are performed on a 24-hour-a-day basis under section D26-22.03(b)(3)) shall reside in or within a distance of one block or 200 feet from the dwelling, whichever is greater, unless the owner resides in the multiple dwelling. Where two or three multiple dwellings are connected or adjoining, it shall be sufficient,

however, that the person who performs janitorial services resides in one of these, but no person who performs janitorial services for more than one multiple-dwelling may service more than 65 dwelling units. Regardless of residence the janitor must have a telephone where the janitor may reasonably be expected to be reached.

STATEMENT OF THE CASE

This action was commenced in July, 1980, by respondents Sterling and La Piana, owners or managing agents of multiple dwellings in New York City who had received sanitation code violations. Essentially, the complaint challenged the constitutionality of the regulatory and procedural framework for the enforcement of New York City's laws relating to the cleanliness of the City streets, inter alia, that the provision of section 1404(d)(2) of the Administrative Code of the City of New York, as amended by Chapter 623 of the Laws of 1979, for "nail and mail" service of sanitation violations, on its face and as applied, did not provide reasonable notice to an individual that an alleged violation was being charged against him. They sought relief, inter alia, declaring this practice unconstitutional and enjoining its continuation, dismissing any judgments

for sanitation violations entered against the individual respondents and awarding damages for the violations of their civil rights.

In an affidavit dated September 25, 1980, and attached to their answer, petitioners set forth the procedures employed in effecting "nail and mail" service where personal service is rendered impossible. The affiant, the Supervisor of the Summons Control Unit, stated that, as a regular practice of the agency, a second mailing, not required by statute, was sent to the actual address of the owner or agent if that address is different from that of the violation's occurrence. The affidavit states:

> "When a summons is not served personally, it is the responsibility of the Summons Control Unit to complete service by mailing a copy of the executed summons to the alleged violator. When the premises where the alleged violation occurred is a dwelling, the address of the premises is put through a computer whose data includes the owner registration files of the Department of Housing,

> Preservation and Development and the tax files of the Department of Finance. If this search identifies an owner or managing agent at a different address than that of the place of occurrence, that name and address is entered upon the summons and an additional copy of this summons is mailed to that address. The date of mailing is stamped on the back of the summons."

The fact that this procedure, including the second mailing to the actual address of the owner or agent if different from the place of occurrence, was in place from the inception of the "nail and mail" provisions in 1979 was never controverted. Rather, respondents alleged merely that they never received second mailings.

The District Court upheld the facial constitutionality of the statute, basing its decision upon Greene v. Lindsey, 456 US 444 (1982), and Mullane v. Central Hanover Bank and Trust Co., 339 US 306 (1950). The Court stated that "[t]he state may rely on a property owner to superintend his

property and may premise a scheme of service of process on the assumption that a notice affixed to the premises will bring the proceeding to the attention of the responsible individual." Appendix, page 52. The mailed notice "provides additional reliability that notice will be received by the affected parties and assures the soundness of the statutory notice." Appendix, page 53. After determining that the other issues raised by respondents in their amended complaint were without merit, the Court remanded the case to Magistrate Caden for the purpose of ascertaining the reliability of enforcement practices with respect to the statute's application to absentee landlords.

The Magistrate summarized the issues to be determined as:

> "whether §1404(d)(2) is constitutional as applied to [respondents]. In other words, are [petitioners'] policies and procedures for applying the

> provisions of §1404(d)(2) in cases of sanitation violations allegedly observed at [multiple dwellings] 'reasonably calculated[,] under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 316 (1950)."

Further, given the fact that appellants had invoked federal jurisdiction under 42 U.S.C. §1983, he found, relying upon Monell v. New York City Department of Social Services, 436 US 658 (1978), that the constitutionality of section 1404(d)(2) as applied was to be considered in terms of "the actual policy, practice or custom of the [petitioners] and not merely the failings of individual SEAs [Sanitation Enforcement Agents]" in particular instances of their service of Notices of Violation on respondents or respondents' witnesses. Nor would the Magistrate, relying upon, inter alia, Brody v. Moan, 551 F Supp 442 (S.D.N.Y.,

1982), consider whether petitioners' policies complied with the precise requirements of section 1404(d)(2), finding that "the possibility of non-compliance raises state, but not constitutional issues." In a Report and Recommendation issued October 3, 1983, the Magistrate found the application of section 1404(d)(2) to be constitutional.

Further hearings were held before the Magistrate at the direction of the District Court to determine, inter alia, whether petitioners had taken steps to amend the "nail and mail" statute by codifying existing practices of the Department with respect to additional mailings. The Magistrate reported that petitioners' enforcement procedures fully comported with constitutional requirements and that the statute was amended on August 6, 1984.

The District Court, by order and judgment dated February 27, 1985,

"adhere[d] to, adopt[ed] in full, and incorporate[d]" its decision and order of July 29, 1982, as well as Magistrate Caden's Reports and Recommendations, entered judgment for petitioners and "closed" the case. Appendix, pages 45-47.

On appeal, the Second Circuit held the "nail and mail" statute unconstitutional as applied to absentee landlords. The Court stated that the "nailed" notice, which is taped high on a wall in the interior vestibule of the building, was unlikely to come to the landlords attention since it was likely to disappear by natural or human forces. Appendix, page 18. It stated that the "mailed" notices required by statute frequently did not reach the landlords and were, therefore, not reasonably calculated to provide notice. Appendix, page 21. The fact that the landlords should have taken reasonable measures to receive mail at or

inspect their buildings was found to be irrelevant to petitioners' reasonable calculation. Appendix, page 22. The Court, in footnote 4, misapprehended the record by stating that second mailings were begun in 1981 and gradually implemented over a three year period. Appendix, pages 28-29. In fact, as indicated above at page 8, the second mailing was always made from the time of the 1979 amendment. In any case, by impermissibly extending Wuchter v. Pizzutti, 276 US 13 (1928), to statutes as applied, the Court refused to consider any extra statutory mailings. Appendix, page 29.

On the Petition for Reargument, the Circuit Court considered but found the presence of a janitor did not significantly increase the possibility of an absentee landlord receiving notice. Appendix, pages 2-3.

REASONS FOR GRANTING THE WRIT

The Court of Appeals, in declaring the "nail and mail" portion of the service of process statute unconstitutional, has decided a substantial federal question in conflict with applicable recent decisions of this Court. See Mennonite Board of Missions v. Adams, 462 US 791 (1983); Greene v. Lindsey, 456 US 444 (1982). In addition, a conflict exists with the New York State decision, Matter of DeFay v. City of New York Environmental Board, 114 AD2d 1 (1st Dept., 1986), 497 NYS2d 666, app. dism., 68 NY2d 664 (1986), upholding the subject statute as constitutional as applied to an absentee landlord and denying reargument of its decision made in light of the subsequent Circuit Court decision in Sterling. __AD2d__, (dec. September 25, 1986). Although the statute has been amended, there exists a potential exposure of millions

of dollars in outstanding judgments affected by the decision. Moreover, this precedent severely limits the ability of government to enforce basic public health laws and encourages absentee landlords affirmatively to seek to avoid receiving process, even to the extent of non-compliance with laws requiring agents to be identified and to be resident in or near landlords' buildings. This precedent is potentially detrimental to municipalities throughout this jurisdiction.

Moreover, the decision of the Court of Appeals will frustrate and likely discourage good faith efforts by public or private entities, who are effecting service of process, to take extra measures to ensure receipt of process in cases where it becomes apparent that service limited to steps required by statute may not result in actual receipt of notice.

Finally, the decision of the Court of Appeals calls into question the constitutionality of one of the most-used forms of service of process of minor violations - that of parking violations, which are commonly affixed to the windshield of automobiles.

1. The Decision of the Court of Appeals conflicts with prior applicable decisions of this Court and needlessly eliminates a valid and efficient procedure to effect service of process.

This Court has repeatedly reaffirmed the propriety of the presumption that the owner of property will sufficiently attend to his property so as reasonably to be expected actually to receive notice posted there. It stated in Mullane v. Central Hanover Bank and Trust Co., 339 US 306, 316 (1950):

> . . . The ways of an owner with tangible property are such that he usually arranges means to learn of

> any direct attack upon his possessors or proprietary rights . . . . A state may indulge the assumption that one who has left tangible property in the state . . . has left some caretaker under a duty to let him know that it is being jeopardized.

Expanding upon this idea the Court stated in Greene v. Lindsey, 456 US 444 (1982), at 451, n.6:

> . . . Of course, the Mullane discussion of the special notice rules with respect to proceedings affecting property ownership focused on the forms of notice that might be appropriate as a supplement to the direct disturbance of the property itself. But where the State has reason to believe the premises to be occupied or under the charge of a caretaker, notice posted on the premises, if sufficiently apparent, is itself a form of disturbance, likely to come to the attention of the occupants or the caretaker.

The Greene Court additionally stated (supra at 451-452):

> The frequent restatement of this rule impresses upon the property owner the fact that a failure to

> maintain watch over his property may have significant legal consequences for him, providing a spur to his attentiveness, and a consequent reinforcement to the empirical foundation of the principle. Upon this understanding, a State may in turn conclude that in most cases, the secure posting of a notice on the property of a person is likely to offer that property owner sufficient warning of the pendency or proceedings possibly affecting his interests.

In sum, this Court has fully endorsed "the presumption that notice posted upon property is adequate to alert the owner or occupant of property of the pendency of legal proceedings." Greene, supra at 452. Of course, any additional notice, whether by publication or mailing, can only further reinforce or buttress the efficacy of the posted notice. See, e.g., Id. at 455 n.9. Cf. Mullane, supra, 339 US at 316.

The "nail and mail" service provided for by the 1979 statute meets the constitutional standard of notice reasonably calculated

under the circumstances to reach the interested parties. It is entirely reasonable to presume that a notice of violation affixed to premises will come to the attention of the person who manages or controls the building. The Greene Court specifically noted that (456 US at 452-453) "posting notice on the door of a person's home would, in many or perhaps most instances, constitute not only a constitutionally acceptable means of service, but indeed a singularly appropriate and effective way of ensuring that a person who cannot conveniently be served personally is actually apprised of proceedings against him." This statement clearly applies to and validates the subject "nailed" service of Sanitation NOV's upon the owners of private homes, commercial establishments and owner-occupied multiple dwellings. It applies equally to multiple dwellings with an on-site or resident

superintendent, in that the superintendent is present at the premises to receive the posted notice on behalf of the absentee owner. Cf. Mullane, supra, 339 US at 316.

The Court of Appeals, in finding that the posted notices were not likely to come to the owner's attention, overlooked our argument that a significant number of multiple dwellings have a resident janitor or superintendent on the premises who, unlike a tenant, may be reasonably expected to look after their employer's interests by forwarding the notice of violation to him. Since superintendents would be actively engaged in their duties at the premises during the same business hours when the SEA would post the notice, and, in most instances, are actual residents of the building, the likelihood of the janitor or superintendent seeing a notice affixed to the

front door before it is removed by "forces human or natural" is very great.

The obligation to have a janitor present at the premises is imposed by law and is a fact upon which the Legislature may base its determination whether notice in a particular form is reasonably calculated to reach the intended recipient.

In regard to janitorial services, Administrative Code of the City of New York, §D26-22.03 (1977 Williams Press Ed., Vol. 4, p. 474 and 1985-86 Supplement at p. 166) provides the following:

> §D26-22.03 Obligations of owner.-a. The owner of a multiple dwelling shall provide adequate janitorial services.
>
> b. In a multiple dwelling of nine or more dwelling units, the owner shall either:
>
> (1) perform the janitorial services himself, if he is a resident owner; or
>
> (2) provide a janitor; or

(3) provide for janitorial services to be performed on a 24-hour-a-day basis in a manner approved by the department.

c. The owner of a multiple dwelling or his managing agent in control shall post and maintain in such dwelling a legible sign, conspicuously displayed, containing the janitor's name, address (including apartment number) and telephone number. A new identification sign shall be posted and maintained within five days following a change of janitor.

In addition, Administrative Code §D26-22.05 (Id., 1985-86 Supplement at p. 167) provides:

§D26-22.05. Residence of person performing janitorial services; limitation on number of dwelling units served. The person who performs janitorial services for a multiple dwelling of nine or more dwelling units (other than where janitorial services are performed on a 24-hour-a-day basis under section D26-22.03(b)(3) shall reside in or within a distance of one block or 200 feet from the dwelling, whichever is greater, unless the owner resides in the multiple dwelling. Where two or three multiple dwellings are connected or adjoining, it shall be

> sufficient, however, that the person who performs janitorial services resides in one of these, but no person who performs janitorial services for more than one multiple-dwelling may service more than 65 dwelling units. Regardless of residence the janitor must have a telephone where the janitor may reasonably be expected to be reached.

Thus, an owner of a multiple dwelling with nine or more units is obliged by statute (which existed in its present form during the period relevant to this litigation) to provide a janitor who must reside on or very near the premises under his care, or the owner must make arrangements satisfactory to the department for other, 24-hour-a-day janitorial service.

At least in the case where the premises consists of nine or more units, we think it reasonable to assume that the owner will comply with the New York City Administrative Code and there will be a janitor continuously on or very near the

premises. In addition, the posting of the name and address of the janitor would greatly increase the likelihood of the first mailing reaching the owner's attention since the name would be recorded on the notice of violation by the SEA.

This Court has indulged a presumption that an owner of property will provide a caretaker to guard his interests in that property. Here, no presumption need be indulged that a caretaker will be at the property since the obligation is imposed by law. The caretaker, as an employee of the owner, may be presumed to act in his employer's interests, at least insofar as providing the owner with the posted notice of violation.

It is at least likely that the janitor will forward the notice of violation to his employer, since, if a default judgment

ensues, the janitor will be held accountable by the owner both for the unsanitary condition that led to the violation notice, and for the owner's lack of notice. Cf. Bender v. City of Rochester, 765 F2d 7 (2d Cir., 1985) (assuming administrator of estate will take steps to preserve estate property against government action, or at least inform the heirs of the notice so they can protect themselves). When the presence of a superintendent or janitor on the premises is taken into account, the likelihood of owners receiving the affixed notice of violation appears to be at least as great as that of a motorist receiving notice of a parking violation left on his vehicle - a form of notice widely used and accepted.

We think it unfair to allow absentee landlords in a densely populated urban environment to avoid accountability for sanitation code violations by allowing them to

set up as an argument that they customarily defy the Administrative Code provisions by not providing a janitor at the premises or posting required signs giving notice of the location of a management office or superintendent's residence. (See Findings of Magistrate Caden, A158-159). These same owners who fail to provide janitorial services at their tenements are obviously owners whose premises will generate numerous notices of violation and who were the most difficult to serve under the former statute. There is no finding in this Record that defiance of the requirement for janitorial services was so widespread and notorious as to undermine the legislative judgment that such a caretaker will be expected to be at every premise of nine or more units. The defiance of law of some owners should not serve to undermine the legitimacy of the legislative assumption that posting at

premises where janitorial services are required by law is reasonably calculated to give notice to the owner.

While the instance of a multiple dwelling which is neither owner-occupied nor employs a resident superintendent may, arguably, present a closer case, the state may reasonably impose upon the owner of such property the burden of inspecting his property for any legal notices prominently affixed thereto. See Greene, supra at 452. The 1979 statute sought further to insure the probability of receipt of an actual notice of any Sanitation NOVs by its additional provision for mail to the owner or managing agent of the premises. The absentee owner of a multiple dwelling could obviate any impediment to his receipt of the "mailed" NOV by simply designating or maintaining a mailbox at the premises for receipt of his mail, a burden entirely consonant with an

owner's well-recognized duty to superintend his property. See Greene, supra, at 452; Mullane, supra, at 316.

2. The Court of Appeals decision erroneously extended the rule of Wuchter v. Pizzutti to cases challenging notice statutes as applied.

Another important consideration in favor of granting the writ is that the Court of Appeals, without discussion of the issue, extended the rule of Wuchter v. Pizzutti, 276 U.S. 13, 24 (1928), to cases challenging the validity of a statute as applied to a particular group. Wuchter held that extrastatutory procedures undertaken to effectuate service of process cannot render valid a procedural notice statute invalid on its face. However, an extension of that rule to cases such as this, challenging a notice statute as applied, finds little support in logic or sound policy. It is precisely in situations where an otherwise facially valid

notice statute is of doubtful validity that the party attempting service of process should be expected to utilize other, extrastatutory procedures to ensure actual receipt of notice. This is exactly what the City did in the period right after the enactment of the 1979 version of the statute. It was determined that in all cases where the SEAs utilize the nail and mail procedure of service on a dwelling, there would be a second mailing of the notice of violation to an address of an owner or managing agent if obtainable from City records. This second mailing greatly enhances the likelihood that the notice of violation will be received. It appears to be accepted by the Court of Appeals that section 1402(d), with the second mailing provision included, would be constitutional as applied to absentee landlords.

This Court has recognized a distinction in reviewing challenges to service of process between cases where personal notice has been given to defendants and those cases where it has not. National Equipment Rental v. Szukhent, 376 US 311, 325 (1964). Here, petitioners claimed that in addition to the statutory "nail and mail" service, a second mailing was made to all persons similarly-situated to plaintiffs. Notably, the courts below did not conclude that actual notice was not received. Allowing the statute to be challenged by individual plaintiffs, who are members of a group who regularly received actual notice of violation via the second mailing, would appear to violate the principle of self-restraint in constitutional adjudication announced by this Court in United States v. Raines, 362 US 17, 21-22 (1960). The proposition that the decision in Raines has overruled Wuchter has

been adopted by at least one Court of Appeals in Wiren v. Eide, 542 F.2d 757, 762-763 (9th Cir. 1976).

Moreover, for sound policy reasons, Wuchter should not be extended to "as applied" challenges. To do so would discourage all attempts to undertake extra measures to ensure not merely satisfaction of the minimum requirements of due process, but as much as possible, effectuation of actual notice. No party is likely to undertake additional extrastatutory measures to effect service if those measures will be totally ignored by the Courts when a defendant challenges the statute as applied to him. A Legislature cannot be expected to anticipate every factual situation which may arise in implementation of a valid statute. The City, early-on in the utilization of the "nail and mail" statute, determined that many owners of multiple dwellings did not have

owner or agent mailboxes on their business premises, nor did they provide signs listing the mailing addresses of the owner or agent. Some of these premises apparently did not conform to the law requiring a resident janitor, or the equivalent, at the premises. The City, in response, in determining to send a second mailing of the notice of violation to the owner's or agent's business premises, in practical effect, interpreted the statutory "premises" more broadly to include the address of an owner or agent if different from the premises where the violation occurred. This broad construction of the statute to remove any doubt of its constitutionality as applied, undertaken by a municipal government, should be given full effect by the Courts. It should not be ignored because of a strained and unwarranted extension of the decision in Wuchter.

The holding in Wuchter has been explained by this Court as bottomed on the failure of the state statute there involved to provide explicitly for communication of notice to the defendant. National Equipment Rental v. Szukhent, 375 US 311, 315 (1964). Obviously, the statute, to withstand challenge, must require every element necessary to comply with at least minimum standards of due process. Here, the New York statute does require every essential element either by personal service of the summons or, if that is not possible, through "nail and mail" service. Specifically, in the latter case, the statute requires that process be left at the premises of the violation and be mailed to that premises as well. If there is a question whether process will be communicated in the factual situation where there is no owner, agent or janitor to be found, that is not because of a deficiency in

the statute, but is a circumstance with which a process server must deal (for example, a second mailing to the actual business address of the owner) within the imperative of the statute to communicate notice. The reasoning of Wuchter is not implicated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorney for Petitioners.

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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October 6, 1986

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DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON THE PETITION FOR REHEARING

LEE STERLING and THOMAS LAPIANA,
Plaintiffs-Appellants,

HOUSING COUNCIL OF NEW YORK, INC.,
Plaintiff-Intervenor-Appellant,

v.

ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,
Defendants-Appellees.

Decided July 7, 1986

Before: NEWMAN, WINTER, Circuit Judges, and COFFRIN, District Judge.

ON PETITION FOR REHEARING

Appellees suggest that we

> may have overlooked [appellees'] argument . . . that a significant number of multiple dwellings have a resident janitor or superintendent on the premises who, unlike a tenant, may be reasonably expected to look after their employer's interests by forwarding the notice of violation to him. Since superintendents would be actively engaged in their duties at the premises during the same business hours when the SEA would post the notice, and, in most instances, are actual

> residents of the building, the likelihood of the janitor or superintendent seeing a notice affixed to the front door . . . is very great.

Appellees' Petition for Rehearing at 2. Appellees also bring to our attention, for the first time, provisions of the Administrative Code of the City of New York, Section D26-22.03 (Williams Press 1977, vol. 4 at 474 & Supp. 1985-1986 at 166), requiring owners of a multiple dwelling with nine or more units to provide full-time janitorial services.

We believe appellees' argument to be without merit. The magistrate specifically found that "in New York City, paper notices affixed to [multiple dwellings] have a very short life span, regardless of whether they are affixed out of the reach of small children." The presence of a janitor or superintendent somewhere in the building, therefore, only marginally improves the chances that a landlord will receive the

"nailed" summons. Moreover, the newly-cited ordinance requires only that a janitor live in the same block, albeit the owners must maintain in each building a sign with the janitor's name, address and telephone number.

Appellees' argument might carry weight had the provisions for nail and mail service provided, as they might easily have done, that the "nailed" summons be given directly to the superintendent or the janitor in a multiple dwelling. It contained no such requirement, however. Instead, it left it to chance that such a person would happen upon the "nailed" summons during its "very short life span."

The petition for rehearing is therefore denied.

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Argued August 12, 1985; decided June 5, 1986

LEE STERLING and THOMAS LAPIANA,
Plaintiffs-Appellants,

HOUSING COUNCIL OF NEW YORK, INC.,
Plaintiff-Intervenor-Appellant,

v.

ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,
Defendants-Appellees.

B e f o r e : NEWMAN and WINTER, Circuit Judges, and COFFRIN, District Judge.[1]

Plaintiffs Lee Sterling and Thomas Lapiana and plaintiff-intervenor Housing Council of New York, Inc. appeal from a judgment of the United States District Court for the Eastern District of New York (Jack

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[1]The Honorable Albert W. Coffrin, Chief Judge, United States District Court for the District of Vermont, sitting by designation.

B. Weinstein, Chief Judge), holding, inter alia, that chapter 623 of the New York Session Laws of 1979, which provides for "nail and mail" service of process, was constitutional. We reverse and hold that, as applied to absentee owners of multiple dwelling housing units in New York City, such service failed to meet constitutional requirements.

Reversed.

ARTHUR R. MILLER, Cambridge, Massachusetts (Lionel A. Marks, New York, New York, of counsel), for Plaintiffs-Appellants.

JOAN E. HANDLER, New York, New York (Frederick A. O. Schwartz, Jr., Corporation Counsel of the City of New York, Francis F. Caputo, Susan M. Shapiro, New York, New York, of counsel), for Defendants-Appellees.

WINTER, Circuit Judge:

Lee Sterling and Thomas Lapiana, two absentee landlords of multiple dwelling housing units in New York City, and the

Housing Council of New York, Inc., an umbrella organization of multiple dwelling landlord groups, appeal from a judgment upholding chapter 623 of the New York Session Laws of 1979 (formerly N.Y. City Charter § 1404(d)(2)) as constitutional. This statute once governed issuance of summonses for violations of New York City's sanitation code. Appellants claim, inter alia, that the "nail and mail" procedure provided by the statute failed to provide adequate notice of violations as required by federal due process. After extended proceedings covering several years, including a trial and several factfinding hearings before a magistrate, final judgment was entered for defendants. This judgment, which held the statute constitutional both on its face and as applied, was based in large part on: (i) the fact that appellees had complied with instructions from the district court to reform

their enforcement practices and to have the statute amended; and (ii) the assumption that there were no outstanding violations based on the earlier statute and enforcement practices that the City was seeking to enforce. Because default judgments against Sterling and Lapiana based on the earlier statute are still the subject of enforcement activity, we must address the merits. We find that chapter 623 was unconstitutional as applied to them, and reverse.

BACKGROUND

This action was brought to challenge the processes formerly used by New York City to enforce its sanitation code. The statute in question is Section 1404(d)(2) of the New York City Charter, as amended by chapter 623 of the 1979 New York Session Laws ("chapter 623" or "the 1979 statute"). Chapter 623 provided an alternative method to personal service for serving notice of

sanitation violations on offending building owners.[1] Use of this method required that a copy of the notice of violation be affixed in a conspicuous place on the building in question, with another copy mailed to "the person" on the premises upon whom service would be proper. This method of service is commonly referred to as nail and mail. Nail and mail service was to be used only after "a reasonable attempt has been made to deliver such notice to [an appropriate] person in such premises." 1979 N.Y. Laws ch. 623.

Sanitation Enforcement Agents ("SEA's"), who were street patrolmen employed by the Department of Sanitation, were responsible for detecting and citing violations of the sanitation code. When using nail and mail process, an SEA was to complete a summons listing relevant information such as the location of the

premises being cited, the time the violation was observed, and the nature of the violation (e.g., improper trash receptacles). The "nailed" copy of this "notice of violation" would be taped in a conspicuous place in the entranceway of the premises. The Environmental Control Board ("ECB"), the agency responsible for adjudication of sanitation violations, would then mail a copy of the notice to the same premises. This letter was usually addressed to "Agent." The notice constituted prima facie evidence of the violation and, if no response was received from a building owner, the ECB would enter a default judgment and impose a fine against the owner. Although substantial numbers of "mailed" notices of violation were returned as undelivered, the ECB made no attempt to record them upon return or to consider such a return as evidence of non-service.

In July 1980, plaintiffs Lee Sterling and Thomas Lapiana, who were the subjects of such default judgments, brought suit pursuant to 42 U.S.C. §§ 1983, 1985, 1988 and New York Civil Rights Law §11 (as later amended), alleging inter alia that nail and mail service was unconstitutional because it did not provide adequate notice under due process standards. They sought damages, declaratory relief and an injunction. In November, 1980, the Housing Council of New York, Inc. was granted leave to intervene.

In April, 1982, the case was tried before a jury in the Eastern District. At the close of the evidence, however, the judge dismissed the claims for damages under Section 1983, deemed the case an action in equity for declaratory and injunctive relief, and submitted the case to the jury as an advisory jury pursuant to Fed. R. Civ. P. 39(c). In answers to special interrogatories,

the jury made several findings favorable to plaintiffs, including a finding that the nail and mail process was not "fairly designed and applied to give notice in a reasonable period that the law has been violated." However, the judge entered an interim decision ruling in defendants' favor on all but one of the claims. The judge ruled that chapter 623 was constitutional on its face, relying largely on Greene v. Lindsey, 456 U.S. 444 (1982), a case decided after the jury in the instant case had made its findings.

The only issue left open was the constitutional validity of the nail and mail statute as applied. The district court found that "[t]here was considerable evidence adduced that, at least in its earlier stages, the program of enforcement was inadequately supervised, leading to unnecessary and unacceptable burdens on some property

owners." These enforcement difficulties were outlined in an October, 1980 report from the Sanitation Inspector General to the Commissioner of the New York Department of Sanitation ("Inspector General's report"). The report, a trial exhibit, was based on covert observation of randomly selected agents responsible for issuing the summonses. It revealed widespread abuse of the nail and mail process.[2] The district court noted, however, that changes in administration and procedure had occurred between the commencement of the suit and the time of trial. It ordered further hearings to determine, inter alia: (i) the extent of training and supervision of enforcement officers to ensure equitable and proper enforcement of the law; and (ii) the reliability of mailed notice in reaching the proper recipient. The case was then referred to a magistrate for hearings.

After holding hearings, the magistrate issued an extensive report on October 3, 1983, which recommended that chapter 623 be found constitutional as applied. As to the first issue, the magistrate's report found that "[s]ince January, 1981, the [Sanitation Department had] made a good faith effort to intensify the training, supervision and retraining of [SEA's] and to respond to complaints regarding violations cited and the allegedly improper use of nail and mail service of summonses."

On the second issue -- reliability of the mailed notice in reaching the intended recipient -- the report found that since 1981 the Department of Sanitation had followed a policy of dual mailings of copies of the violations. One copy was mailed to the address listed on the summons, and another copy was mailed to the person listed in the files of the New York City Department of

Housing and Preservation ("HPD"), or of the New York City Department of Finance, as the owner or managing agent of the building responsible for the violation. This was pursuant to a triennial registration program requiring owners of multiple occupant dwellings to register their address with HPD. Because HPD was phasing in a program of compiling such files over a three-year period, however, it appears that the second mailings were not made to all absentee landlords until 1984.

In November, 1983, the district court stated that it would accept the recommendation of the magistrate if the defendants proved that certain specified procedures were in place and if the defendants successfully sought to have Section 1404(d)(2) amended by the state legislature to codify the Department of Sanitation's evolving practice with respect to

mailing a notice to the address of the owner or managing agent as listed in the HPD's files.

In April, 1984, the judge denied an oral motion for class certification and referred all outstanding motions back to the magistrate. Final resolution of the case was delayed pending amendment of the statute. The amendment, chapter 944 of the 1984 New York Session Laws, became effective in August, 1984. In October, the magistrate issued a report finding that the defendants had complied with the conditions imposed by the trial judge. The report again recommended that Section 1404(d)(2) be found constitutional as applied.

On February 27, 1985, the judge closed the case. The final judgment adopted and incorporated the interim 1982 decision of the court, as well as the magistrate's prior reports and recommendations. The judgment

was entered on the understanding that there were no outstanding default judgments pending against plaintiff Lapiana, and that the ECB would reopen proceedings on all eleven default judgments pending against plaintiff Sterling. In dismissing the case, the judge stressed the great improvements that had been made during the course of the litigation and concluded that plaintiffs had received all the relief they had sought.

On appeal, plaintiffs contend, inter alia, that chapter 623 is unconstitutional, and that the district court erred in refusing to certify a class.

DISCUSSION

1. The Constitutional Claims

Appellants claim that the nail and mail method of serving process under the 1979 statute was unconstitutional as applied to absentee New York City landlords such as Sterling and Lapiana. They base their claim

partly upon alleged enforcement abuses prevalent during the early period following passage of the 1979 law, and partly upon the inadequacy of nail and mail as a method of serving sanitation summonses upon absentee owners or landlords. Because we base our decision on the latter ground, we do not reach the issues raised by the enforcement abuses in the early period.

In rebutting appellants' due process claims, appellees rely on the 1984 amended statute. They contend that the 1979 statute is now irrelevant. However, appellees are still seeking to enforce default judgments entered against Sterling and, although the record here is less clear, against Lapiana under the prior statutory scheme. If those default judgments are based on constitutionally invalid service of process, subsequent amendments to the governing law cannot validate the earlier judgments.

Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). We do not believe that the 1979 statute provided such notice in the case of absentee landlords in New York City. "[A] statute . . . may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." Boddie v. Connecticut, 401 U.S. 371, 379 (1971). Notices posted on exterior doors of urban multiple residences may well disappear quickly due to forces human or natural, and absentee landlords are likely never to learn of such a notice. Tenants in urban settings

may have little incentive to protect the interests of absentee owners, and chance alone seems to be the principal determinant of whether the "nailed" notice reaches the owner.

In Greene v. Lindsey, 456 U.S. 444 (1982), the Supreme Court invalidated a statute that allowed notice of a forcible entry or detainer action to be posted on a tenant's door. The Court noted that in many cases posting would be likely to afford actual notice, id. at 452, but concluded that mere posting on an apartment door, without further steps such as mailing, did not satisfy the minimum standards of due process. Id. at 453. The likelihood that the posted notices in the instant case will reach the intended recipient is less than in Greene, because owners such as appellants do not live on the premises.

The mailing required by the 1979 statute did not make up for the deficiencies of the "nailed" notice so far as absentee landlords are concerned. The statute did not require that a copy of the summons be mailed to the business address of the property owner. Instead, it stated that "a copy shall be mailed to the person at the address of such premises." 1979 N.Y. Laws, ch. 623. "The premises" are merely the building where the notice was posted, while "the person" is apparently a reference to "a person in such premises upon whom service may be made." See supra note 1. A copy of the summons was thus mailed to the address where the citation was issued, usually bearing the additional notation "Agent" on the envelope.

Because many landlords do not receive mail at buildings they own and because "Agent" may not alert postmen to the

purpose of the mailing, the evidence shows that the mailed notices frequently did not reach the landlords. A substantial number of "mailed" notices were returned as undelivered but were not monitored by ECB. Rather, it entered a default judgment, which, in circumstances not relevant here, might later be reopened. Even when reopening was granted, moreover, a defendant was left to proving the negative of non-receipt by oral testimony because the ECB assumed that if the "mailed" notice was not delivered, the "nailed" notice would suffice.[3] Because we regard the "nailed" notice as wholly unreliable with regard to absentee landlords, we believe that the statute can be saved only if the "mailed" notice is constitutionally adequate standing alone. For the reasons stated, however, the required mailing is not reasonably calculated to provide notice to absentee landlords, cf.

Greene, 456 U.S. at 455, and default judgment against such landlords should not have been entered.

Appellees argue that appellants could have ensured their receipt of summonses merely by placing and monitoring an "owner's mailbox" at each of their buildings. However, the Supreme Court has made clear that "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." Mennonite Board of Missions v. Adams, 462 U.S. 791, 799 (1983).

Finally, a statutory requirement that landlords register their mailing addresses with the City and that a copy of the mailed notice be sent to that address was feasible and would have greatly increased the likelihood of actual notice to absentee landlords. See Schroeder v. City of New York, 371 U.S. 208, 212-13 (1962); Walker

v. City of Hutchinson, 352 U.S. 112, 116 (1956). In light of the deficiencies described above, the 1979 statute's failure to require this second mailing renders that law unconstitutional as applied to defendants,[4] because without it they were deprived of constitutional valid notice.[5]

2. Class Action Status

Appellants claim that the lower court erred in denying a motion to certify the case as a class action. This motion was made three and one-half years after commencement of the lawsuit, after a full trial, and after two extensive rounds of hearings before a magistrate. Whether a case should proceed as a class action is "peculiarly within the discretion of the trial judge," Becker v. Schenley Industries, Inc., 557 F.2d 346, 348 (2d Cir. 1977), and a party's failure to move for class certification until a late date is a valid reason for denial of such a motion.

See Green v. Philbrook, 576 F.2d 440, 446 (2d Cir. 1978). The district judge was thus well within his discretion in denying appellants' motion for class certification.

CONCLUSION

We find that the 1979 statute was unconstitutional as applied to absentee owners of multiple dwelling housing units against whom default judgments were entered. We remand to the district court for the issuance of appropriate injunctive and declaratory relief.

FOOTNOTES

1/ Chapter 623 amended §1401(d)(2) of the New York City Charter to read as follows:

> (2) The environmental control board shall not enter any final decision or order pursuant to the provisions of paragraph one of this subdivision unless the notice of violation shall have been served in the same manner as is prescribed for service of process by article three of the civil practice law and rules or article three of the business corporation law, except that service of a notice of violation of any provision of the charter or administrative code, the enforcement of which is the responsibility of the commissioner of sanitation and over which the environmental control board has jurisdiction, may be made by affixing such notice in a conspicuous place to the premises, the occupancy of which caused such violation, provided that such notice may only be affixed where a reasonable attempt has been made to deliver such notice to a person in such premises upon whom service may be made as provided for by article three of the civil practice law and rules or article three of the business corporations law. When a copy of such notice has been affixed, pursuant to this paragraph, a copy shall be mailed to the person at the address of such premises; proof of such

> service shall be filed with the Environmental Control Board within twenty days; service shall be completed within ten days after such filing.

1979 N.Y. Laws, ch. 623.

2/ The October, 1980, Inspector General's report found that SEA's operated under a "guideline" that 20 summonses be issued daily, without regard to the type of service used. Because the SEA's found the nail and mail process entailed less work than personal service, perhaps over 90 percent of summonses were issued by that method. Further, many SEA's issued their daily quota of citations during the morning hours, writing afternoon times on some of the violation forms to create the appearance of day-long work. This particular abuse was facilitated by the use of nail and mail because no one on the spot could challenge the incorrect time written on the posted

notice. More than half (58.3%) of the SEA's observed had engaged in this activity at some point during the Inspector General's survey. Because nail and mail was so easy, some SEA's bypassed violations at buildings where personal service would be necessary, and then issued a nail and mail summons to an adjacent building. The Inspector General's Report concluded that "[t]he lack of proper field supervision [was] a major contributing factor to poor or improper performance by Sanitation Patrolmen."

3/ The effect of the statute is demonstrated by the proceedings against Sterling. He had several default judgments entered against him for violations between 1980-82. Chief Judge Weinstein ordered ECB to reopen those judgments. A hearing was held in 1985 at which Sterling claimed not to have received notice. This claim was rejected on the

grounds that "Sterling admits to not having personal knowledge of the facts and circumstances surrounding the issuance of each [notice of violation . . .] I find that respondent's explanation is insufficient to rebut respective prima facie cases herein." The problem faced by absentee landlords claiming a lack of service was of course aggravated by ECB's failure to monitor returned notices of violation in the period in question.

4/ Although dual mailings were not required by law until passage of the 1984 statute, the ECB apparently has, since 1981, gradually phased in a policy of landlord registration and of mailing an additional copy of the summons that address. This change was one of the reforms adopted under the supervision of the district court, and codification of this requirement was accomplished by the 1984

statute. Since the full implementation of this policy appears to have coincided roughly with the amendment requiring such a mailing, it cannot affect our ruling. Moreover, extrastatutory measures cannot render valid a statute unconstitutional on its face. See Wuchter v. Pizzutti, 276 U.S. 13, 24 (1928). We see no reason why such measures can validate a statute invalid as applied to one group.

5/ We do not decide whether the 1979 statute provided adequate notice to owners of multiple residences who lived on the premises, although the question does not appear to merit serious consideration. The particular default judgments before us relate only to Sterling and Lapiana.

ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED FEBRUARY 27, 1985.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LEE STERLING and THOMAS LAPIANA,

Plaintiffs,

HOUSING COUNCIL OF NEW YORK, INC.,

Plaintiff-Intervenor,

-against-

ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Defendants.

WHEREAS, plaintiffs Lee Sterling, Lionel Alan Marks and Thomas LaPiana, owners or managing agents of multiple dwellings in New York City, instituted this action in July of 1980 against the Environmental Control Board of the City of New York ("ECB").

WHEREAS, by stipulation, on August 8, 1980 plaintiffs served and filed an amended complaint brought pursuant to 42 U.S.C. §§1983, 1985 and 1988 and Section 11 of the New York Civil Rights Law naming as defendants the ECB and the City of New York and claiming:

(1) that Section 1404(d)(2) of the New York City Charter ("Charter") as amended by Chapter 623 of the Laws of 1979 providing for "nail and mail" service of process of sanitation summonses on its face and as applied fails to afford building owners and agents due process;

(2) that the "nail and mail" statute is discriminatorily enforced against building owners and agents in violation of their rights to equal protection and due process;

(3) that building owners and agents are deprived of due process and a fair hearing of the charges against them because of the

dual prosecutory and adjudicatory role played by members of the ECB; and

(4) that the statutory minimum penalties for sanitation violations violate the federal and state constitutional proscriptions against excessive fines.

WHEREAS, on November 4, 1980, the Court granted leave to intervene to the Housing Council of New York, an umbrella organization of four groups of multiple dwelling landlords, that intervention was limited to the allegations raised in the amended complaint.

WHEREAS, on the morning of trial plaintiff Lionel Alan Marks withdrew his own causes of action in order to continue to act as plaintiffs' trial counsel.

WHEREAS, this case was tried before the Chief Judge and a jury on April 15, 16, 19, 22 and 23, 1982.

WHEREAS, after hearing plaintiffs', plaintiff-intervenor's and defendants' cases in full, the Chief Judge dismissed plaintiffs' claim for damages under Section 1983 for failure to sustain their burden of proof, submitted the case to the jury as an advisory jury and deemed the case an action in equity seeking declaratory and injunctive relief.

WHEREAS, the Chief Judge in a Memorandum and Order dated July 29, 1982 found Section 1404(d)(2) of the Charter constitutional on its face and rejected various other claims made by plaintiffs in the amended complaint.

WHEREAS, the Court also found that the constitutionality of Section 1404(d)(2) of the Charter as applied was less certain but there had been various changes in procedure and administration of the law both between the time suit was commenced and the time of

trial and between the time of trial and the present.

WHEREAS, the Chief Judge ordered that a hearing to be held to ascertain the current functioning of the system with respect to, among others, the following issues: (1) training and supervision of Department of Sanitation enforcement officers in the field in connection with their obligation to enforce the law equitably, to make reasonable attempts at personal service and to suitably affix notices; (2) the reliability of the mailed notice reaching its intended recipients as reflected in return mail statistics and new procedures to insure delivery and receipt, including improved listings of owners and agents of property; (3) assurance that mailed notices returned as undelivered are considered in determining not to penalize the intended recipient; and (4) other methods of

protecting the rights of property owners and agents.

WHEREAS, the parties appeared for trial on the aforementioned four issues which was scheduled for January 19, 1983, at which time plaintiffs orally moved to amend their complaint to allege improprieties in the enforcement and docketing of judgments for sanitation violations rendered by the ECB.

WHEREAS, on January 19, 1983, the Chief Judge granted plaintiffs' oral motion and permitted them to raise alleged docketing and collection improprieties.

WHEREAS, on January 19, 1983, the Chief Judge by oral order of reference referred the case to Magistrate John L. Caden for the purpose of conducting the aforesaid hearing and to supervise discovery on the alleged docketing and collection improprieties.

WHEREAS, hearings on the aforementioned four items concerning the constitutionality of "nail and mail" as applied were held before Magistrate Caden on February 2, 3, 8, May 26 and June 3, 1983.

WHEREAS, plaintiffs filed a supplemental complaint dated April 1, 1983.

WHEREAS, by motion dated June 2, 1983, defendants moved to strike the supplemental complaint, or in the alternative, to dismiss the supplemental complaint.

WHEREAS, the parties by their attorneys appeared for oral argument on June 23, 1983 on defendants' motion and plaintiffs' opposition thereof.

WHEREAS, the Chief Judge orally granted plaintiffs' motion to file the supplemental complaint, deemed that complaint denied by defendants and reaffirmed the earlier order of reference to Magistrate Caden to supervise discovery on

the alleged docketing and collection improprieties.

WHEREAS, Magistrate Caden issued a Report and Recommendation dated October 3, 1983 finding defendants' application of Section 1404(d)(2) of the Charter to be constitutional in all respects.

WHEREAS, plaintiffs then moved to vacate and set aside the Magistrate's Report dated October 3, 1983, for a preliminary injunction staying the docketing and enforcement of judgments rendered by the ECB and to set aside the Memorandum and Order dated July 29, 1982.

WHEREAS, the parties by their attorneys appeared for oral argument on November 16, 1983 on the plaintiffs' motions and defendants' opposition thereto.

WHEREAS, on November 16, 1983, the Chief Judge denied plaintiffs' oral motion to vacate judgments entered by the ECB and

attachments filed against plaintiffs Sterling and LaPiana and directed that individual applications to set aside judgments should be made before the ECB and, upon denial in that forum, by way of an Article 78 procedure.

WHEREAS, by Order dated November 28, 1983, the Chief Judge denied plaintiffs' motion seeking a preliminary injunction staying defendants' docketing and enforcement procedures, denied plaintiffs' motion to set aside the Memorandum and Order dated July 29, 1982, denied plaintiffs' motion to vacate the Report dated October 3, 1983 on the condition that defendants submit proof showing that the following procedures are in effect:

> a. that the affidavit of alternative service/posting which presently appears on the back of the white copy of the notice of violation which is issued by the Department of Sanitation is filled out and executed prior to filing such notices of violation with the

Environmental Control Board ("ECB");

b. that the appropriate affidavit(s) of mailing(s) for notices of violation which are issued by the Department of Sanitation are filled out and executed prior to filing such notices of violation with the ECB;

c. that the Department of Sanitation has a process that provides that it completes its mailing(s) of the notices of violation to respondents which it issues by "nail and mail" for alleged sanitation violations within five (5) business days of the date of offense/date of issuance (the first business day being defined as the business day after the alleged offense occurred);

d. that the ECB has a firm policy which is uniformly applied whereby when it receives a request to open a default judgment and its computer history of that notice of violation demonstrates that both mailings (where there have been ECB mailings to both the place of occurrence and respondent's address of record) have been returned as undelivered that such request is granted and the default is vacated and respondent granted a hearing;

e. that defendants have taken steps to seek an amendment of Section 1404(d)(2) of the Charter

of the City of New York to provide, in instances where resort is made to "nail and mail" issuance of a sanitation violations, [sic] for the codification of the existing practices of the Department of Sanitation with respect to additional mailings of notices of violation, and such an amendment has been adopted; and

f. that defendants shall reexamine the envelope in which notices of alleged sanitation violations are mailed to respondents by the Department of Sanitation to determine whether the envelope should carry additional official identification and accomplish this change.

WHEREAS, by motion dated February 17, 1984, plaintiffs moved pursuant to 15 U.S.C. §169f, the Fair Debt Collection Practices Act, to enjoin defendants ECB and its collection agents from using allegedly unfair collection activities; to vacate the judgments entered by the ECB and attachments filed against plaintiffs Sterling and LaPiana; for an order requiring the Department of Sanitation of the City of New York to computerize its returned mail which

it receives from issuance of notices of violation; for an order declaring that the Commissioner of Sanitation has no power to adopt regulations codifying the second mailing requirement; and for class certification.

WHEREAS, by motion dated March 6, 1984, defendants moved to compel plaintiffs and plaintiff-intervenor to respond to defendants' interrogatories and requests for documents dated July 27, 1983 relating to alleged collection and docketing improprieties.

WHEREAS, the parties by their attorneys appeared on April 3, 1984 before the Chief Judge, the Court denied plaintiffs' oral motion for class action certification.

WHEREAS, a hearing pursuant to the November 28th Order was held on April 3, 1984 before Magistrate John L. Caden.

WHEREAS, plaintiffs moved that this Court mark into evidence a report dated August 1984 by Assemblyman John C. Dearie and the New York State Assembly Standing Committee on Cities entitled "New York City's Sanitation Enforcement Policy" and that declaratory relief be granted accordingly.

WHEREAS, by Order dated September 22, 1984, the Chief Judge granted plaintiffs' motion insofar as it seeks to accept the above-mentioned report for purposes of judicial notice and denied the motion insofar as it seeks any declaratory relief.

WHEREAS, Magistrate Caden issued a Report and Recommendation dated October 19, 1984 finding that defendants have met their burden of proof in all respects and have shown compliance with the six procedures outlined by the Chief Judge in his Order of November 28, 1983 and

recommending that defendants' application of Section 1404(d)(2) of the Charter be found constitutional.

WHEREAS, Magistrate Caden issued a Report and Recommendation dated November 1, 1984 making the following recommendations: that plaintiff's motion pursuant to 15 U.S.C. §1692(f) seeking an order restraining defendant ECB and its collection agents from using allegedly unfair and unconscionable debt collection practices in order to collect ECB judgments be denied; that plaintiffs' motion to vacate the judgments entered by the ECB and the attachments filed against plaintiffs' Sterling and LaPiana be denied; that plaintiff's motion for an order requiring the Department of Sanitation of the City of New York to computerize its return mail which it receives from issuance of notices of violation be denied; that plaintiffs' motion for declaratory

relief finding that the Commissioner of Sanitation has no power to adopt regulations codifying the second mailing requirement as it would modify laws enacted by the New York State legislature be denied; that plaintiffs' motion for class certification be denied; and that defendants' motion to compel answers to interrogatories and production of documents be granted.

WHEREAS, plaintiffs then moved to vacate and set aside both the Magistrate's Report dated October 19, 1984 and his Report dated November 1, 1984.

WHEREAS, the parties by their attorneys appeared for oral argument on December 18, 1984 on the plaintiffs' motions to set aside each of the Magistrate's Reports and the defendants opposition thereto.

WHEREAS, the defendants by their attorney stipulated on the record on December 18, 1984, that defendant ECB will

reopen their proceedings on notices of violations number 029-734-880, 021-910-718, 021-489-353, 015-956-261, 021-122-137, 019-382-431, 016-001-857, 013-429-458, 013-730-409, 013-730-418 and 013-230-504 and schedule all of the eleven enumerated notices of violation for hearing with the issuing officer present, if available, on the same day before an administrative law judge.

WHEREAS, plaintiff Thomas LaPiana has no outstanding notices of violation pending before the ECB which are currently the subject of docketing, collection or enforcement activities.

IT IS HEREBY ORDERED AND ADJUDGED:

1. This Court's Memorandum and Decision dated July 29, 1982, which is set forth in full as Appendix A, is adhered to and incorporated herein.

2. The Magistrate's Report and Recommendation dated October 3, 1983, which is set forth in full as Appendix B, is adhered to, adopted in full and incorporated herein.

3. The Magistrate's Report and Recommendation dated October 19, 1984, which is set forth in full as Appendix C, is adhered to, adopted in full and incorporated herein.

4. The Magistrate's Report and Recommendation dated November 1, 1984, which is set forth in full as Appendix D, is adhered to, adopted in full and incorporated herein.

5. Because none of the pending notices of violation in issue are subject to any docketing or collection activity and because the statutory scheme for the issuance and adjudication of sanitation violations is constitutional on its face and as applied, any

allegations as to docketing and collection improprieties are moot.

6. Judgment is entered for the defendants and the case is hereby closed.

So Ordered.

Dated: Brooklyn, New York
February 27, 1985

JACK B. WEINSTEIN
Chief Judge

DECISION AND ORDER OF THE DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

LEE STERLING and THOMAS LAPIANA,

Plaintiffs,

-and-

HOUSING COUNCIL OF NEW YORK, INC.,

Plaintiff-Intervenor,

-against-

ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Defendants.

WEINSTEIN, Ch. J.

Plaintiffs Lee Sterling and Thomas Lapiana, owners or managing agents of multiple dwellings in New York City, and plaintiff-intervenor the Housing Council of New York, an umbrella organization of four groups of multiple dwelling landlords,

challenge the recently enacted regulatory and procedural framework for the enforcement of New York City's laws relating to the cleanliness of the streets. Specifically, plaintiffs seek declaratory and injunctive relief against the City of New York and the City's Environmental Control Boar (ECB) on the following claims:

(1) that §1404(d)(2) of the New York City Charter as amended by Chap. 623 of the laws of 1979 providing for "nail and mail" service of process of sanitation summonses as applied fails to afford building owners and agents due process;

(2) that the "nail and mail" statute is discriminatorily enforced against building owners and agents in violation of their rights to equal protection and due process;

(3) that building owners and agents are deprived of due process and a fair hearing of the charges against them because of the

dual prosecutory and adjudicatory role played by members of the ECB; and

(4) that the statutory minimum penalties for sanitation violations violate the federal and state constitutional proscriptions against excessive fines.

The case was tried before the court and an advisory jury on April 15, 16, 19, 1982. The jury answered the following special questions:

1. Is the nail and mail process fairly designed and applied to give notice in a reasonable period that the law has been violated? No.

2. Have there been attempts with due diligence by Sanitation Officers to effect personal service upon responsible individuals, before using "nail and mail" service? No.

3. Can a person receive a fair and impartial hearing from the Administrative Law

Judges hearing violations in sanitation cases? No.

4. Is there a conflict of interest in the Commissioner of Sanitation or the Deputy Commissioner of Sanitation being a member of the Environmental Control Board? Yes.

5. Are the procedures of the Environmental Control Board fair and reasonable? No.

6. Are the fines imposed by the Environmental Control Board proportioned to the offense? No.

7a. Are there issuances of multiple violations? No.

b. Is this a violation of due process and equal protection? No.

8. Is the "nail and mail" scheme designed to give notice to the responsible individual? No.

9. Does the "nail and mail" enforcement program of the Department of

Sanitation discriminate against building owners? Yes.

Subsequent to the trial the Supreme Court decided Greene v. Lindsey, 102 S. Ct. 1874 (1982). On the basis of that decision it is clear that the New York statute satisfies in principle the constitutional requirement of "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950). The state may rely on a property owner to superintend his property and may premise a scheme of service of process on the assumption that a notice affixed to the premises will bring the proceeding to the attention of the responsible individual. Greene v. Lindsey, supra at 1879. The

second statutory requirement of notice mailed to the premises provides additional reliability that notice will be received by the affected parties and assures the soundness of the statutory notice. As the Greene opinion notes, after posting, "notice by mail may reasonably be relied upon to provide interested persons with actual notice of judicial proceedings." Id. at 1881.

The other claims with respect to the size of fines and procedures on adjudication were well within legislative powers, given the constitutionality of the basic method of notifying property owners. Property owners and agents are entitled to due process and the court recognizes the great service they provide in making available desperately needed housing. Nevertheless, it is the legislature not the courts that must resolve the conflict between competing interests so long as it does so within broad constitutional

boundaries. Given the serious problem faced by the City in keeping its streets clean while funds for municipal services have been drastically reduced, the courts must recognize the broad legislative discretion in meeting the problem.

Although plaintiffs have presented some evidence that the nail and mail statute is more frequently applied against owners of multiple dwellings than it is against other types of violators, they have failed to make the requisite showing that such selective treatment is based upon some impermissible consideration, such as race or religion, intent to inhibit or punish the exercise of some constitutional right, or malice, bad faith or intent to injure. Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064 (1886); Le Clair v. Saunders, 627 F.2d 606 (2d Cir. 1980), cert. denied, 450 U.S. 959, 101 S. Ct. 1418 (1981).

Plaintiffs are afforded a fair and reasonable hearing on the charges against them before the administrative law judge (ALJ) of the ECB and by the Board itself which reviews recommendations of the ALJs and renders final decisions. Plaintiffs allege among other things that the fact that the ALJs are per diem employees precludes their rendering impartial recommendations to the ECB to which they are responsible; that the Department of Sanitation's interest in revenue taints the hearing process; that the ex officio role of the Commissioner of Sanitation, or his delegate, on the ECB having final adjudicatory authority creates a conflict of interest with his responsibility as chief enforcement officer of the sanitation laws and thus deprives plaintiffs of due process. Although the structure of the ECB and its relationship to the Department of Sanitation suggest that each performs both

judging and prosecuting roles such a combination of functions does not offend due process where, as here, the evidence does not "overcome a presumption of honesty and integrity in those serving as adjudicators." Withrow v. Larkin, 421 U.S. 35, 47, 95 S. Ct. 1456, 1464 (1975). In this era of agency proliferation examples of permissible mixing of such functions on an institutional level abound. The Commissioner or his designee sitting on the ECB is not personally directly engaged in either investigating or prosecuting the sanitation violations. Plaintiffs unsubstantiated allegations of a conflict of interest are insufficient to sustain their constitutional claim. See generally 2 Davis, Administrative Law Treatise § 13.02 (1958 and Supplement 1976).

With respect to the penalty structure, plaintiffs complain of the mandatory nature of the fines which precludes consideration of

mitigating circumstances and that the fines imposed by the ECB are excessive. The statute provides for civil penalties of not less than $25 nor more than $100 for containerization violations and of not less than $50 nor more than $250 for littering or sidewalk maintenance violations. Under the former penalty structure the City's recovery averaged $3.16 per issued summons and $9.43 per issued summons answered by personal appearance. The City concluded that the former fines and levels of recovery were both ineffective as deterrents and insufficient to meet the cost of enforcement. See Project Scorecard at 7, Defendant's Appendix 2. Considering the difficulties of policing the entire city, the importance of clean and sanitary streets, inflation and comparable increases in other penalties such as those for traffic offenses, the increased penalty structure is neither unreasonable nor

excessive. Nor does the mandatory character of the minimum fine violate the Constitution. Plaintiff's objection that mitigating circumstances may not be considered for the purpose of ameliorating the fine is not well taken; mitigating circumstances seem to be accounted for in connection with the affirmative defense of compliance by "reasonable efforts" which would lead to the more favorable result of dismissal of the violation. See Environmental Control Board, Sanitation Manual, Part I, §3.5 (Working Draft Oct. 1981), Defendant's Exhibit L.

The constitutionality of the nail and mail statute as applied is less certain. There was considerable evidence adduced that, at least in its earlier stages, the program of enforcement was inadequately supervised, leading to unnecessary and unacceptable burdens on some property

owners. Because of various changes in procedure and administration of the law both between the time suit was commenced and the time of trial and between the time of trial and the present, the court is not able to ascertain the current functioning of the system with respect to, among others, the following issues: (1) training and supervision of Department of Sanitation enforcement officers in the field in connection with their obligation to enforce the law equitably, to make reasonable attempts at personal service and to suitably affix notices; (2) the reliability of the mailed notice reaching its intended recipients as reflected in return mail statistics and new procedures to insure delivery and receipt, including improved listings of owners and agents of property; (3) assurance that mailed notices returned as undelivered are considered in determining not to penalize the

intended recipient; and (4) other methods of protecting the rights of property owners and agents.

Accordingly, the case is set down for a hearing on these matters on September 21, 1982, at 9:30 A.M. Additional evidence may be submitted with respect to modifications of the enforcement policies and practices of the Department of Sanitation and the ECB designed to remedy the abuses that came to light during the course of the trial. The parties are directed to submit proposed findings of fact and conclusions of law one week before the hearing in preparation for a final judgment.

So ordered.

Dated: Brooklyn, New York
July 29, 1982

JACK B. WEINSTEIN
Chief Judge

No. 86-600

IN THE

Supreme Court of the United States

October Term, 1986

ENVIRONMENTAL CONTROL BOARD OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,
Petitioners,

against

LEE STERLING and THOMAS LAPIANA,
Respondents,

and

HOUSING COUNCIL OF NEW YORK, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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November 3, 1986

Questions Presented.

When a United States Court of Appeals has held that a "nail and mail" notice statute was unconstitutional as applied to absentee landlords because it required notices of sanitation violations to be posted in and mailed to premises where the landlords did not reside, and when the record shows both that a large number of the mailed notices were returned undelivered and that the posted notices frequently disappeared before the landlords could discover them, should this Court grant a Writ of Certiorari to review the case, even though the "nail and mail" procedures were widely abused, the "nail and mail" statute was amended almost two years before it was declared unconstitutional, and petitioners seek only to collect thousands of default judgments that were obtained pursuant to their former procedures?

When petitioners for a Writ of Certiorari ask this Court to review an issue that could not arise in their case unless this Court rejected findings of fact that were made by a United States Magistrate and adopted by a United States Court of Appeals, should this Court review that issue?

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION.

Statement of the Case.

This case concerns New York City's former "nail and mail" procedure for issuing notices of sanitation violations to absentee owners of multiple occupancy dwellings. By a 1979 amendment to the New York City Charter, Sanitation Enforcement Agents (SEA's) were authorized to post notices of violation in premises at which violations occurred, and to mail copies of the notices to those premises. *See* Chapter 623 of the New York Session Laws of 1979. The "nail and mail" procedure was used almost exclusively for multiple occupancy dwellings. *See* Department of Sanitation Memoranda, October 2, 1981 and December 12, 1981. (Joint Appendix 2d Cir. p. 60-61).

Since many absentee owners of multiple dwellings do not receive mail at the dwellings they own, and since by definition they do not reside there, the "nail and mail" notices very frequently failed to reach them. *See Sterling v. Environmental Control Board of the City of New York,* 793 F.2d 52, 57 (2d Cir. 1986). As the United States Court of Appeals for the Second Circuit pointed out in this case, " 'in New York City, paper notices affixed to [multiple dwellings] have a very short life span.' " *Sterling v. Environmental Control Board of the City of New York,* 795 F.2d 8, 9 (2d Cir. 1986) (on Petition for Rehearing) (quoting Report of United States Magistrate Caden). Furthermore, because so many landlords did not receive mail at their multiple dwellings, "[a] substantial number of the 'mailed' notices were returned as undelivered." *See Sterling;* 793 F.2d at 57 (2d Cir. 1986). Although New York City required absentee owners to register their business addresses with the city, *see* N.Y.C. Administrative Code §D26-41.03, the "nail and mail" statute did not require

notices to be mailed to those addresses. *See* Chapter 623 of the New York Session Laws of 1979.

The "nail and mail" procedures were widely abused. The Second Circuit described their operation as follows:

> The October, 1980, Inspector General's report found that SEA's operated under a "guideline" that 20 summonses be issued daily, without regard to the type of service used. Because the SEA's found the nail and mail process entailed less work than personal service, perhaps over 90 percent of summonses were issued by that method. Further, many SEA's issued their daily quota of citations during the morning hours, writing afternoon times on some of the violation forms to create the appearance of day-long work. This particular abuse was facilitated by the use of nail and mail because no one on the spot could challenge the incorrect time written on the posted notice. More that half (58.3%) of the SEA's observed had engaged in this activity at some point during the Inspector General's survey. Because nail and mail was so easy, some SEA's bypassed violations at buildings where personal service would be necessary, and then issued a nail and mail summons to an adjacent building.

Sterling, 793 F.2d at 55 n.2.

Respondents Lee Sterling and Thomas LaPiana are absentee owners of multiple occupancy dwellings in New York City who were served with notices of violation by "nail and mail." Petitioner Environmental Control Board (ECB) entered default judgments against them, and increased the amount of those judgments sixfold by adding

default penalties. Sterling and LaPiana allege that they never received notice of the proceedings against them.

As a general practice, the ECB did not reopen default judgments when a defendant alleged a lack of notice, and they did not monitor the mailed notices that were returned undelivered. *See id.* at 57. It is striking that even after the District Court in this case ordered the ECB to reopen the default judgments against Sterling, the ECB refused to accept lack of notice as a defense. *See id.* at 57 n.3. As the Second Circuit explained, the ECB left defendants "to prov[e] the negative of non-receipt by oral testimony because [they] assumed that if the 'mailed' notice was not delivered, the 'nailed' notice would suffice." *Id.* at 57.

Respondents Sterling and LaPiana initiated this suit on July 3, 1980 under 42 U.S.C. §§ 1983, 1985, and 1988 and New York Civil Rights Law §11 to challenge the constitutionality of the "nail and mail" statute both on its face and as applied. The Housing Council of New York, Inc., an umbrella organization representing groups of landlords of multiple occupancy dwellings in New York City, intervened in this action on November 4, 1980.

This case was heard over a period of four years before the United States District Court for the Eastern District of New York. In 1982, an advisory jury found that the "nail and mail" process was not fairly designed and applied to give notice to defendants, that SEA's did not attempt with due diligence to effect personal service, and that the ECB's procedures were not "fair and reasonable." *See* Petitioners' Appendix at 50-51. However, an October 3, 1983 Report by United States Magistrate Caden upheld the constitutionality of the "nail and mail" statute, relying on changes in the Department of Sanitation's and the ECB's

procedures that were instituted in 1982. Sterling and La-Piana moved to vacate the Magistrate's report, but Chief Judge Weinstein denied that motion on the condition that petitioners took steps to amend the statute. *See id.* at 38-43. The statute was amended effective August 6, 1984. *See Sterling,* 793 F.2d at 56; Chapter 944 of the New York Session Laws of 1984. Chief Judge Weinstein then adopted Magistrate Caden's report, declared the "nail and mail" statute constitutional, and "closed the case" in an order dated February 27, 1985. *See* Petitioner's Appendix at 30-47.

The United States Court of Appeals for the Second Circuit reversed Chief Judge Weinstein's order and unanimously held that "the 1979 statute was unconstitutional as applied to absentee owners of multiple dwelling housing units against whom default judgments were entered." *Sterling,* 793 F.2d at 58. The court stated that, "we regard the 'nailed' notice as wholly unreliable with regard to absentee landlords" because "[n]otices posted on exterior doors of urban multiple residences may well disappear quickly due to forces human or natural, and absentee landlords are likely never to learn of such a notice." *Id.* at 56-57. The court also found the "mailed" notice inadequate because it was not mailed "to the business address of the property owner," but rather to the address of the premises, where "many landlords do not receive mail." *Id.* at 57. In consequence, the court stated, "the evidence shows that the mailed notices frequently did not reach the landlords" and "[a] substantial number of the 'mailed' notices were returned as undelivered." *Id.* Although petitioners claimed that they remedied the constitutional inadequacy of the "nail and mail" procedure by sending extrastatutory second mailings when a search of computer files revealed a business address for absentee landlords,

the court found that the computer files were incomplete, and that the second mailing procedure was not fully implemented until roughly the time when the statute was amended. *See id.* at 55, 58 n.4.

On June 19, 1986, petitioners filed a petition for rehearing with the Second Circuit. Relying on an ordinance requiring owners of large multiple dwellings to provide janitors who live nearby, they urged that court to limit its "declaration of unconstitutionality . . . to absentee-owners of multiple dwellings [containing] less than nine residential units." Petition for Rehearing at 8. The Court of Appeals unanimously rejected defendants' argument as "without merit," and emphasized that the ordinance cited by petitioners had not been brought to their attention before. They also pointed out that the ordinance did not require on-site janitors, and that the presence of an on-site janitor would only marginally improve the chances that notice would be received because the lifespan of posted notices in New York was so short. *See Sterling,* 795 F.2d at 9.

Reasons for Denying the Writ.

Petitioners do not seek to reinstate the "nail and mail" statute that was invalidated in this case. *See* Petition at 16-17. That statute was amended almost two years before it was declared unconstitutional,[1] and petitioners contended before the Second Circuit that the former statute was "irrelevant." *See Sterling v. Environmental Control Board of the City of New York,* 793 F.2d 52, 56. Rather,

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[1]Pursuant to a conditional order by Chief Judge Weinstein, petitioners took steps to amend the statute, and the amendment was enacted into law on August 6, 1984. *See,* Petitioners' Appendix at 38-43; Chapter 944 of the New York Session Laws of 1984.

petitoners seek only to enforce the thousands of default judgments that they obtained against absentee landlords pursuant to their former "nail and mail" procedures.[2] *See* Petition at 16-17. Since this case concerns a straightforward application of this Court's precedents in *Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Greene v. Lindsey*, 456 U.S. 444 (1982), and since petitioners raise no legal issues that require this Court's attention, the Petition for Certiorari should be denied.

I. The Second Circuit's Opinion Correctly Applied this Court's Precedents and Based its Decision on Sound Considerations of Policy.

This case presents a straightforward application of this Court's precedents requiring that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Neither petitioners' "nailed" notice nor their "mailed" notice was reasonably calculated to reach absentee landlords, because the statute required both notices to be delivered to an address at which the landlords did not reside. As the advisory jury impaneled by the District Court found, SEA's did not attempt "with due diligence . . . to effect personal service," and petitioners' "nail and mail" service of process was not "fairly designed and applied to give notice." *See* Petitioners' Appendix at 50.

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[2]It is worth noting that, even if petitioners' legal contentions were accepted, their default judgments would remain subject to constitutional attack because the Second Circuit "[did] not reach the issues raised by the enforcement abuses in the early period" of the "nail and mail" statute's operation. *See Sterling*, 793 F.2d at 56.

The Second Circuit determined that petitioners' " 'nailed' notice [was] wholly unreliable with regard to absentee landlords" because "[n]otices posted on exterior doors of urban multiple residences may well disappear quickly due to forces human or natural, and absentee landlords are likely never to learn of such a notice." *Sterling v. Environmental Control Board of the City of New York*, 793 F.2d 52, 56-57. In *Greene v. Lindsey*, 456 U.S. 444 (1982), this Court invalidated a statute allowing notices of eviction proceedings to be posted on tenants' doors because the notices "were 'not infrequently' removed by children or other tenants before they could have their intended effect." *See, id.* at 453. In the instant case, the Second Circuit held that "[t]he likelihood that the posted notices . . . will reach the intended recipient is less than in *Greene*, because owners such as [respondents] do not live on the premises." *Sterling*, 793 F.2d at 57.

Moreover, the inadequacy of the posted notice was not remedied by the mailed notice: the "nail and mail" statute required notice to be mailed only to the address of the premises where an alleged sanitation violation occurred, a place where, by definition, absentee landlords did not reside. In consequence, "the mailed notices frequently did not reach the landlords," and large numbers were returned to the ECB undelivered. *See id.* The inadequacy of petitioners' procedure is particularly striking because, although landlords were required to register their business addresses with the City, *see* N.Y.C. Administrative Code §D26-41.03, the "nail and mail" statute did not require petitioners to mail notices to those addresses. *See* Chapter 623 of the New York Session Laws of 1979.

The Second Circuit based its decision in this case on sound considerations of policy. As this Court stated in

Fuentes v. Shevin, 407 U.S. 67 (1972), "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' " *Id.* at 80 (quoting *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863)). Furthermore, the record in this case "revealed widespread abuse of the nail and mail process." *See Sterling*, 793 F.2d at 55 & n.2. That abuse made the ECB's presumption that "nail and mail" service gave defendants actual notice manifestly unjust. *See Sterling*, 793 F.2d at 57n.2.

Contrary to petitioners' argument, "nail and mail" service of sanitation violations presents no analogy to the posting of parking tickets on car windshields. *See* Petition at 18, 27. Multiple occupancy dwellings, unlike cars, are immobile, and the owners of multiple dwellings *can* conveniently be served by alternative means. Indeed, the amended "nail and mail" statute now requires either personal service upon a building's caretaker or a supplementary second mailing to an absentee owner's correct address. Petitioners do not claim that this has proved unduly inconvenient.

Apparently, petitioners do not challenge the Second Circuit's holding that the "nail and mail" statute was unconstitutional. They challenge only the application of that holding to absentee owners of multiple dwellings containing nine or more units. *See id.* at 1, 22-27. They claim that "nail and mail" notice was more likely to reach those owners because a New York ordinance requires a janitor to "reside in or within a distance of one block or 200 feet from the dwelling, whichever is greater." *See id.* at 22-27; N.Y.C. Administrative Code §D26-22.05.

On Petition for Rehearing, the Second Circuit unanimously rejected that argument as "without merit," and emphasized that the quoted ordinance had not been brought to their attention before. *See Sterling v. Environmental Control Board of the City of New York*, 795 F.2d 8, 9 (on Petition for Rehearing). The court pointed out that "the newly-cited ordinance requires only that a janitor live in the same block," not in the dwelling itself, and that even an on-site janitor "only marginally improves the chances" that notice will be received, because, " 'in New York City, paper notices affixed to [multiple dwellings] have a very short life span.' " *See Id.* (quoting Report of United States Magistrate Caden). The court also stated that petitioners' argument "might carry weight had the [statute] provided, as [it] might easily have done, that the 'nailed' summons be given directly to the superintendent or the janitor in a multiple dwelling. It contained no such requirement, however." *Id.*

II. The ECB's Extrastatutory Second Mailings were Instituted too Late to Remedy the "Nail and Mail" Statute's Constitutional Inadequacy.

Having failed to show any conflict between the Second Circuit's holding and this Court's prior decisions, petitioners ask this Court to review a subsidiary issue that simply does not arise in this case. They repeat their claim, rejected below, that they remedied the "nail and mail" statute's constitutional inadequacy by sending extrastatutory second mailings to absentee landlords. *See* Petition at 31-32. *Compare Sterling*, 793 F.2d at 55, 58 n.4. They then argue that the Second Circuit unduly extended this Court's long-standing precedent that extrastatutory measures cannot remedy an unconstitutional notice statute, *see Wuchter v. Pizzutti*, 276 U.S. 13, 24 (1928), to cases

holding notice statutes unconstitutional as applied.[3] *See* Petition at 30-36. Petitioners' argument misrepresents both the Second Circuit's opinion and the record of this case.

The Second Circuit's reference to *Wuchter* was not essential to its holding. *Wuchter* would have been relevant to this case only if the ECB actually sent second mailings to all absentee owners during the period before the "nail and mail" statute was amended. *See Sterling*, 793 F.2d at 58 n.4. But the Second Circuit found, relying on Magistrate Caden's report, that "second mailings were not made to all absentee landlords until 1984." *See id.* at 55. Accordingly, the court stated explicitly that, "[s]ince the full implementation of [the extrastatutory second mailing] policy appears to have coincided roughly with the amendment requiring such a mailing, it cannot affect our ruling." *Id.* at 58 n.4.

Despite the Second Circuit's statements that the second mailings were implemented too late to remedy the "nail and mail" statute, petitioners seek to relitigate the facts of

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[3]Petitioners also claim that *Wiren v. Eide*, 542 F.2d 757, 762-63 (9th Cir. 1976), holds that *Wuchter* has been "overruled." *See* Petition at 32-33. That claim is incorrect. *Wiren* holds only that a defendant who received actual notice lacks standing to challenge the constitutionality of a notice statute, and that when a defendant has received actual notice, *Wuchter* should be interpreted "in light of" the principle of judicial self-restraint. *See Wiren*, 542 F.2d at 762-63. In the instant case, of course, there is absolutely no evidence that Sterling or LaPiana received timely notice of the sanitation violations with which they were charged. Furthermore, petitioners' argument that Sterling and LaPiana should be denied standing to challenge the constitutionality of a notice statute on the grounds that they "are members of a group who regularly received actual notice" would overrule a long line of this Court's precedents stretching back to *Pennoyer v. Neff*, 95 U.S. 714 (1877).

this case. They repeat their claim that "a second mailing was made to all persons similarly-situated to plaintiffs." *See* Petition at 31-32. And as support for that claim, they rely on a single affidavit alleging that it was "the responsibility of the Summons Control Unit" to send second mailings when a search of computer files provided a landlord's correct address. *See id.* at 9-10. Crucially, however, that affidavit does *not* allege that the computer files were complete or up to date. *See id.*

In October, 1983, Magistrate Caden found that the computer files searched by the ECB were neither complete nor up to date: the files "[did] not contain a record of the name and address of the owner or managing agent for every [multiple occupancy dwelling] in the City. Nor [were] all of the names and addresses on file maintained in computer memory." Magistrate Caden's Report, October 3, 1983, at 27. Petitioners' affidavit is hardly a sufficient basis for asking this Court to reject the factual findings of a United States Magistrate, especially when those findings have been adopted by a United States Court of Appeals. *See Sterling,* 793 F.2d at 55, 58 n.4.

Thus the scope of this Court's holding in *Wuchter* has no bearing on the instant case, because petitioners failed to provide notice reasonably calculated to reach absentee landlords, even taking the second mailings into account. However, petitioners' failure to provide adequate notice does constitute a perfect illustration of this Court's rationale in *Wuchter. Wuchter* held that extrastatutory measures cannot remedy an unconstitutional statute because "[a] provision for service that leaves such a clear opportunity for the commission of fraud or injustice is not a reasonable provision." *Wuchter,* 276 U.S. at 19 (citation omitted). In the instant case, the widespread abuse of the

"nail and mail" procedure and the large number of default judgments that petitioners seek to collect demonstrate clearly the fraud and injustice that can result when a legislature fails to consider all of the groups to whom a notice statute will be applied. Petitioners claim that extending *Wuchter* to statutes unconstitutional as applied would discourage state and local governments from employing extrastatutory measures when a notice statute is "of doubtful validity." *See* Petition at 30-31, 33. But, as the record of this case shows, state and local governments should be deterred from *enacting* statutes of doubtful validity, not encouraged to add extrastatutory procedures to invalid statutes.

Conclusion.

The Petition for a Writ of Certiorari should be denied. This case concerns a straightforward application of this Court's precedents to a statute that had already been amended, and petitioners raise no legal issues that merit this Court's attention.

Respectfully submitted,

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